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ECONOMIC COMPETITION AND RESTRICTIVE BUSINESS PRACTICES: THE DEVELOPMENT OF JAMAICAN COMPETITION LEGISLATION

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I. INTRODUCTION AND BACKGROUND

1. Since 1982 Jamaica has embarked on a process to transform its highly regulated and government-controlled economy into a more market-based environment. The basic elements of this economic reform process include removal of price control, privatization of government-owned monopolies, liberalization of foreign exchange, exchange and interest rate reforms, liberalization of foreign trade and investments, and banking and financial sector reforms.

2. While there has been very little doubt about the need for the reforms, concern has been expressed about how far the reforms should be carried, their timing and order, and whether all the reforms should be pursued simultaneously. The question narrows down to a single issue, that is, after 40 years of government control, is shock therapy the most appropriate vehicle to bring about a market economy or should the changes be applied progressively? The arguments against shock treatment is that it leads to serious dislocation, unacceptably high levels of unemployment and social unrest. The slower approach, on the other hand, runs the risk of extending the transition process and hence the extension of the pain and hardship.

3. Whichever approach is taken by a country, each element of the economic reform is integrally linked to the others. The promotion of a competitive market environment through competition (or using the American term "anti-trust") legislation, to curtail and eliminate restrictive business practices, market power and dominant behaviour is essential to this process.

II. WHAT IS THE GOAL OF COMPETITION POLICY?

4. In July of 1890 America introduced the Sherman Anti-trust Act on the heels of agitation against trusts. Its prohibition of combinations, contracts and conspiracies in restraint of trade and monopolization was based on common law, and some observers claimed it simply codified the common law. 1/ The environment of Jamaica in the 1980s however, was not that of trusts and takeovers, nor was there any need to break up such organizations. The environment has been one of government-regulated prices and trade margins, capacity licensing and import controls. It is for this reason that the private sector has maintained that trade liberalization is more central to the emergence of a competitive market in Jamaica than legislating competitive behaviour. The historical development of cartels, concerted action to fix prices, and restrictive practices, especially in the retail trade has led to a condition in Jamaica where variation in price for the same item is seen as socially unjust and against the interest of society. After several decades, the consumer has come to accept that fair prices can only prevail if these prices are set by Government.

5. In 1991 when the Government removed price controls from bread and construction blocks, bakers and block makers through their respective trade associations came together and not only imposed a single price, but in each

instance claimed that the fixing of a single price was in the interest of the consumer. The prevailing attitude in Jamaica in the postwar years has been that competition is harmful and even destructive. The notion of striving for superiority was seen as inherently objectionable and ethically unsound in the 1970s.

6. Competition law is based on two distinct but related concepts: market power and dominance. 2/ While the maximization of consumer welfare by achieving the most efficient allocation of resources - allocative efficiency - and productive efficiency through reducing costs as far as possible are paramount, there are several other objectives ascribed to competition law. The combined effect of productive and allocative efficiencies is that society's wealth overall is maximized. Under perfect competition, prices at which goods are sold never rise above the marginal cost of production. Monopolists, on the other hand, are free from constraints of competition and may restrict output, resulting in prices higher than would normally prevail in order to obtain monopoly profit or rent. Monopolists are also normally under no pressure to introduce innovations which change the status quo and hence provide the consumer with wider choice at lower prices through lower costs.

7. There is a further objection to monopoly. As the monopolist is not constrained by competitive forces to reduce cost to its lowest possible level, the firm becomes X-inefficient. 3/ While resources are used to make the right product, they are used less productively. There has been criticism that perfect competition is theoretical. The question, however, is whether competition has any properties sufficiently beneficial to justify its protection. The conclusion would seem to support the view that competition is beneficial, hence the policy prescription towards more market economies. It is a contradiction for the private sector to call for a market economy yet seek transfer of the Government monopolies into the hands of private monopolies. Some economists have settled for a more practical concept of competition, recognizing the limitations of perfect competition. Clarke's idea of workable competition, 4/ the best competitive arrangement that is practicably attainable, has been invoked by United Kingdom and European Community competition authorities on various occasions. A further modification to the theory of competition has been that of Baumol's contestable market concept as a basis for competition law. 5/ Firms would be forced to ensure optimal allocation of resources provided that the markets in which they operate are contestable. The important feature here is that entry and exit are free to the industry and the market need not be a model of perfect competition. The theory has been invoked especially during the recent deregulation of airline industries.

8. A second objective of competition policies is that of safeguarding individuals against the power of monopolist or anti-competitive agreements. In so doing, competition law can prevent the transfer of wealth to the monopolist at the expense of the consumer. A third objective has been to secure dispersal of economic power and the redistribution of wealth. Here economic equity is promoted rather than economic efficiency. Large companies can become a threat to the very notion of democracy, individual freedom of choice and economic opportunities. This reasoning led to the dismemberment of

AT&T in the United States. Linked to this argument is the view that competition law should be used to protect small firms against more powerful rivals: a level playing field should be provided so that the small firm is given a fair chance to compete.

9. Competition legislation impacts on business and commercial life in three areas: the conduct of business, the structure of economic markets, and economic performance. Conduct regulation usually relates to prohibition of conduct that either restrains trade, lessens competition or lessens the abuse of market power. Competition law, as it relates to economic structure, impacts on corporate transactions - usually mergers, takeovers, joint ventures and asset transfers - when such transactions seek to weaken the independence of competing firms and raise concentration in economic markets to undesirable levels. Intervention in economic performance comes about when the Government seeks to correct monopoly situations or restraint of trade by controlling prices or outputs.

III. THE HISTORICAL DEVELOPMENT OF ANTI-COMPETITIVE MARKETS IN JAMAICA

10. The Inter-American Development Bank 6/ in its review of Jamaican competition policy papers in 1992, found that there was very little documentation or written material on restrictive business practices, monopolistic behaviour or consumer unfairness practices. There has, however, been a long history of the growth of anti-competitive markets in Jamaica. This growth and development has been encouraged by successive governments since 1950. It has existed in all areas of the economy - manufacturing, distribution, agriculture, banking and finance, and in construction.

11. Anti-competitive markets have been encouraged through general merchandise laws such as the 1951 Trade Law and specific industry measures, particularly as they relate to agricultural and agro-industry products. The laws introduced to control agricultural products are of two types: those designed to control the products of specific industries, mainly the export crops, and those which cover marketing or minor crops and domestic farm products.

12. The marketing controls over agricultural products and essential items emerged from the defence regulations which were introduced during World War II, and during the emergency period which followed the end of the war. Industry control laws were introduced after 1945, for sugar, coconut, coffee, cocoa, banana and rice. In the case of minor products, these have been regulated by the Agricultural Marketing Law and the Produce Law. Under these laws, the Government fixed prices, regulated trade and operated as a monopsony purchaser of produce for export.

13. Drug products, motor vehicles and motor vehicle parts, and hardware items have in one form or other been regulated under the Trade Law. Government either fixed the minimum prices for these products or fixed the percentage margins for wholesalers and retailers. In the 1960s and 1970s, importers of drugs were allowed a mark-up of 10 per cent and pharmacists 25 per cent. Similarly, the wholesaler was allowed a mark-up of 10 per cent for hardware

items and the retailer between 12.55 and 17.5 per cent. Under the Motor Vehicle and Motor Vehicle Parts and Accessories Prices Control Order of 1961, successive Governments have regulated the mark-up on motor vehicles and motor vehicle parts.

14. The 1955 Trade Law established the Prices Commission. The Commission has, over the years, been responsible for fixing and monitoring items under price controls. Up to the time of removing price controls in 1992, well over 100 groups of items were still regulated. Price controls and regulation of distribution have over the years been administered by the Agricultural Marketing Corporation and the Jamaica Commodity Trading Company (JCTC). Both institutions monopolized the trade for a wide range of goods in the 1970s and 1980s. In the 1980s, JCTC monopolized the trade in basic food items such as rice, as well as motor vehicles, pharmaceuticals and hardware items. By 1990 the company's annual losses amounted to 113 million Jamaican dollars and its indebtedness exceeded 1.5 billion Jamaican dollars, evidence of massive subsidies as part of the Government's redistributionist policy.

15. A second area in which anti-competitive markets emerged was through the system of capacity licensing and industrial incentive legislation. Capacity licensing was used to balance supply and demand, to regulate entry to markets and keep out new entrepreneurs. Between 1948 and 1970 various incentive legislation was introduced as part of the country's industrial policy, which sought to encourage domestic production of imported items. Important among these laws have been specific laws relating to the textile industry, the motion picture industry and the cement industry.

16. The granting of exclusive manufacturing rights, high tariffs, and quantitative restrictions encouraged the development of a manufacturing sector based on monopoly rather than competition. The result is that most firms never developed the competitive incentive to modernize their plants and processes for higher levels of productivity or the competitive marketing skills to be able to deal with the global competitive market-place.

17. In 1986, the Planning Institute of Jamaica Report 7/ concluded that the effect of the industrial incentive regime and capacity licensing was the creation of monopoly enterprises which relied upon protection rather than competition for their survival. Accordingly, the incentives rewarded inefficiency through high prices instead of promoting efficiency. The lack of competition allowed firms to ignore the need to introduce up-to-date technology, the result being that Jamaica entered the 1990s with obsolete equipment and processes in its factories.

18. The incentive policies were reinforced in the 1960s and 1970s by trade policies such as import restrictions and tariff barriers which served only to insulate domestic producers from international competition. Until the 1980s, a complex and pervasive system of import licensing was in place. The effect of the licensing system and regulation of foreign exchange was to direct the importation of capital goods, consumer items and raw materials into the hands of a few large importer-distributor trading houses. Under this system, most small commercial importers were denied entry to markets.

19. In the same Planning Institute of Jamaica study of 1986, a sample survey of 48 consumer goods prices showed that the licensing system had the effect of restricting entry and raising prices on three quarters of the goods in the sample. The report concluded that the system of protection was not only arbitrary but distortionary and resulted in resource misallocation. Since 1985, there has been progressive liberalization of the trade regime. Import licensing and quotas have been removed on most items and the exchange market has been fully liberalized, with the result that domestic manufacturers and the traditional importer-distributor encounter serious competition for the first time.

20. Over the years, the Government has also imposed entry restrictions and encouraged price-fixing in several other areas of commerce. Permits are still needed in Jamaica to operate car rental and taxi services for the hotel industry as well as to operate petrol stations. The sale of telephone equipment is in the hands of one franchised operator. In the case of the professions, the system of fee schedules has effectively eliminated price competition in respect of the marketing of their services.

21. At the time of the introduction of the competition law in 1993, only one or two firms were found to be operating in a number of industries. Examples of products affected are: soap, tyres, cement, steel, petroleum, condensed milk, yeast, beer and aluminium extrusions. In the distributive trade, there have been several cartels in existence: the Block Makers Association, the Pharmaceutical Association, the Bakers Association, the Hardware Merchants Association, the Gasoline Retailers Association, to name but a few. In rural Jamaica, the retailers have established informal cartels and indulged in widespread price-fixing in the local market.

22. Data collected by the Prices Commission 8/ in 1980 on a broad range of food items found that a single price prevailed island-wide in a vast majority of cases. In the case of pasteurized and condensed milk, cornmeal, rice, bread, flour and chicken, a single price prevailed in at least 85 per cent of the shops surveyed. The Prices Commission report concluded that these findings were typical of the result of the Commission's Price Monitoring Surveys which cover 83 supermarkets, grocery shops and other retail outlets island-wide.

IV. THE DEVELOPMENT OF COMPETITION POLICY AND COMPETITION LEGISLATION IN JAMAICA

23. In 1990, as part of the overall structural adjustment programme, the Government decided that there was a need to tackle the process of eliminating distortions in the market-place, minimize misallocation of resources and generally provide for a more competitive economy. The 1990 price increase of electricity rates evoked unfavourable public responses to the extent that government ministers and the senior management of the electricity company, Jamaica Public Service Company, were forced to meet with consumers and the public to allay their concerns.

24. Following these meetings, the Government announced that competition policies and competition legislation were to be introduced to complement the wider market liberalization process which had been initiated in the early 1980s. The Government's position was that because of the high level of

concentration of the domestic market, trade liberalization and privatization of State monopolies were not sufficient to bring about dramatic changes in the market reform process. These developments, while necessary, were not expected on their own to change trade practices and behaviour which had become a part of commercial practice for several decades. Incumbent firms already in market-dominate positions would be in a position to entrench themselves prior to any liberalization of trade with impact on domestic markets.

25. In 1990 the Government announced that it had established a Cabinet Sub-Committee and a Technical Task Force to design and develop new policies and legislation to provide the country with the legal framework for a competitive and deregulated economy. The new policy measures were to address four related areas of market operations. 9/

26. First, regulatory measures were to be introduced to deal with fiduciary responsibilities and market imperfection in the financial services sector in the form of changes to the Bank of Jamaica Act and the Money Lenders Act. New legislation was to be introduced in the form of a Banking and Financial Services Act. These new policy measures would address the criteria for entry, capital adequacy, asset diversification, insider and connected party transactions, as well as establish areas of permissible activity.

27. Secondly, new legislation measures were to be introduced to provide for the introduction of a Securities and Exchange Commission and to strengthen the role of equity investment in the deregulation of the economy. Previously the system of regulating the Jamaican Stock Market was through voluntary action. The Stock Exchange Control Council responsible for the regulation was itself composed of a majority of its own members, and over the years the members had acted to limit entry of new stockbrokers into the market on the basis that the market was not large enough to be exposed to competition.

28. Thirdly, regulatory measures were to be introduced to control market power of the natural monopolies and utilities, to afford consumer protection against acts of the utilities and to provide for more transparency in the establishment of utility prices. It was expected that the new regulatory measures would apply to water, electricity and telecommunication. The legal authority to regulate these industries was contained in the existing industry-enabling legislation and the sector minister had effective power to grant licences and approve price increases. The Public Utility Commission, which was introduced in 1965 to regulate telephone and electricity services, was disbanded in 1975 when both services were nationalized. When the Government introduced the privatization programme for telecommunications in 1989, no provision was made for the reintroduction of a transparent regulatory regime. The conclusion of Spiller and Sampson 10/ in 1993 was that the regulatory changes of 1987 in the telecommunications sector seemed to have erred in preserving a tight monopoly over all telecommunication segments and that this represented a missed opportunity in the process of regulatory privatization.

29. Fourthly, new policies and legislation were to be introduced to encourage competition in the Jamaican economy, to curtail restrictive business practices and anti-competitive behaviour, provide for consumer protection and to regulate mergers and acquisitions. Up to 1990, like most developing countries, Jamaica had never considered a policy to enhance competition. The

law as it then stood was based entirely on common law. English common law developed around the restraint of trade doctrine. Courts normally would not enforce a contract which provided for unreasonable restraint of trade, as to do so would be contrary to public policy. 11/ There were, however, several exceptions to this doctrine.

30. Since the Government's announcement, a new Securities Act was passed in 1993 and a Securities Commission established. Amendments to the Bank of Jamaica Act and the Money Lenders Act have been made and a new Banking and Financial Services Act introduced. The Bank Inspectorate Division of the Bank of Jamaica has been substantially restructured and strengthened. After a period of widespread national debate, new legislation has been introduced in Parliament for a new Telecommunication Act to replace the 1893 Telephone Act. The Jamaican Cabinet has approved new proposals for the establishment of new enabling legislation providing for the establishment of an Office of Utility Regulation and a Director General to regulate the electricity and telecommunication industries. Telecommunication has been fully privatized since 1992 and the Government has announced plans to privatize parts of the electricity industry.

V. THE 1993 FAIR COMPETITION ACT

31. In January 1991 the writer produced a policy paper entitled "Principles, Purpose and Policy Objectives of the Jamaican Competition Act" for the Government of Jamaica. The central features of the new competition policy were prohibition of certain types of restrictive business practices, restriction of horizontal interlocking directorates, control over horizontal mergers, restriction of unfair consumer practices, liberalization of the market for professional services, as well as the establishment of a Competition and Monopolies Commission and a Competition Court.

32. Except for North America, most modern competition laws have been codified since the end of the Second World War. The 1980s saw most OECD countries up-dating and strengthening their competition laws. The American and German laws have been structured around a judicial system in which enforcement is circumscribed by statutes. There are certain unique features of the United States system. The United States is the only country maintaining government agencies that share parallel authority to enforce the laws. Treble damages available to litigants form a very strong deterrent against violation and a strong incentive for private litigation. Selective granting of exemptions is seldom adopted. It was decided at the initial stages that for these reasons Jamaica would not adopt a United States-style anti-trust regime.

33. Modern United Kingdom competition law started with the 1948 Monopolies and Restrictive Practices (Inquiry and Control) Act and the 1955 Restrictive Trade Practice Act. These Acts sought to prohibit collective agreements to restrain competition. Several other items of legislation were subsequently introduced. In principle, the law operates by balancing the harm to competition against a variety of standards that define the public interest. In the Jamaican legislation, it was decided that emphasis was to be placed on the economic criterion of protecting competition, instead of standards dealing with the public interest which allowed for the imposition of political judgements.

34. The policy paper was followed by a report which was the result of a short visit by a technical team from the United States. 12/ Subsequent to this visit the earlier policy recommendations and the views of the Technical Task Force were restructured into a draft policy document. These policies were later produced as a Green Paper for public discussion.

35. The Green Paper was tabled in Parliament in the summer of 1991. 13/ Public debate was extensive. In addition to papers form the Private Sector Organization of Jamaica (PSOJ), the Jamaica Chamber of Commerce, the Cane Farmers Association, the Jamaica Bar Association as well as Myers, Fletcher and Gordon, a leading law firm, comments were also received from the University of the West Indies, the United Kingdom Office of Fair Trade, the World Bank and the Inter-American Development Bank.

36. Almost from the beginning the private sector and the Jamaica Bar Association took the position that in a small economy such as Jamaica's there was no justification for the proposed legislation. Considerable sums were spent to mount a publicity and lobby campaign to squash the bill. The Bar Association's main position was that there was no earlier policy position on the part of the Government to liberalize the professions.

37. Notwithstanding the various criticisms, the Government finally introduced legislation in 1993. There were major changes, however, between the early policy paper and the final legislation. The requirement for a Competition Court was removed. The idea of the Competition Court had been adapted from the Japanese system which combines two stages, the first stage being administrative and the second stage being judicial, through appeals to the courts. The Act eventually provided for a Fair Trade Commission with very wide powers of investigation. It will have authority to enter business places, recover relevant documents and summon persons before it under oath. It has powers to prescribe remedies that it deems fit for any abuse of dominant position and other breaches of law. Its positions are enforceable by way of pecuniary sanctions through the Supreme Court. The law also allows an individual a private right of action to pursue breaches of the Act directly with the Supreme Court.

VI. ISSUES RAISED BY THE PUBLIC AND BY INTERNATIONAL AGENCIES

38. Issues raised by the commercial sector and the international agencies fall into eight categories:

(a) the scope, objectives and reach of law;

(b) the relationships between trade policies and competition policies;

(c) arguments based on economies-of-scale and the need to exclude measures to regulate mergers;

(d) exemption of the professions and inclusion of trade unions;

(e) that the management cadre in Jamaica is too small and the prohibition of interlocking directorates would harm business;

(f) that the criteria established to determine which activities should be exempted were inadequate;

(g) types of restrictive business practices and consumer unfairness practices which should be prohibited;

(h) the structure and independence of the Commission and the enforcement procedures which should be adopted.

VII. THE PURPOSE AND REACH OF THE ACT

39. The general position taken by the business sector and legal profession was that the legislation contemplated at the time was too broad in scope, too complicated, fundamentally misguided and inappropriate for an economy the size of Jamaica and at the country's stage of economic development. The business sector claimed that if the policies so recommended were enacted, they would serve to put Jamaica at a comparative disadvantage vis-à-vis the country's CARICOM trading partners and generally weaken its international competitiveness. It called for the legislative effort to be abandoned or alternatively that Jamaica should conclude negotiations with its CARICOM partners to ensure harmonized competition policies and legislation. If anything had to be legislated, the measure should be confined to constraints on restrictive business practices such as horizontal price-fixing, restrictive trade agreements and consumer protection matters. 14/ It was claimed that no other developing country had a competition law. While it is true to state that in the past competition policies have been pursued more aggressively in OECD countries, several developing countries have also introduced competition legislation since 1960. Argentina, Brazil, Chile, Columbia, Côte d'Ivoire, Gabon, Kenya, India, Mexico, Pakistan, Peru, Sri Lanka, Thailand, Tunisia, Venezuela, and the Republic of Korea, as developing countries, have all introduced competition laws and several countries including the Central and Eastern European States were in the process of doing so at the time Jamaica was considering the introduction of new legislation in 1990. 15/ It was also argued that the new costly authority which was being recommended was not necessary, as such new legislation as was needed could be enforced by the Attorney General and the Director of Public Prosecutions.

40. No piece of legislation should be considered an end in itself. Legislation is the means for securing policy objectives; whether the legislation is desirable or justifiable at all involves an evaluation of the merits of these objectives. Moreover, legislation related to competition, which engages in social and economic engineering, often does not engender the precise end-result desired by Parliament. Very careful consideration must be given to the actual provisions to be adopted in the legislation. It was never the intention of the Green Paper to provide the final wording of the Act, merely to indicate that the broad principles were to be the subject of more precise formulation by those experienced in drafting bills within the Commonwealth system of law.

41. One view of competition law is that its sole purpose should be to secure efficiency; in this context efficiency is taken to mean maximization of consumer welfare. Restrictive business practices should be permitted only if business conduct reduces total output of a particular industry. No other

benefits to society should be accommodated; otherwise conflicts will arise and their eventual solution would give rise to political decisions rather than economic decisions. Competition is to be seen as a means to ensure efficiency and only to this extent should it be protected.

42. Another view, which is also concerned with efficiency, states that efficiency in the narrow terms of allocative and productive efficiency should not be regarded as the only goal of competition legislation because other important benefits can also be secured. Competition serves to prevent control of economic activities falling into the concentrated hands of a few firms. Where industry is concentrated, monopoly power arises and the consumer is eventually harmed, as the monopolist seeks to increase prices by reducing supplies. Firms with economic power will acquire political power and leverage to a degree inconsistent with democracy, especially where there is an absence of countervailing power. Such concentration should be avoided in small economies. This behaviour is evidenced in the telecommunications industry in several economies, including Jamaica's.

43. Competition is also looked to for enhancing business freedom. Concentration of economic and market power may curtail individual choice and liberty and could also lead to the stifling of innovation. In many instances, where one or two firms came to dominate the Jamaican markets under the protective trade regime, they failed to introduce new technology in their products or processes. Vigorous domestic competition serves to enhance the ability of the local firm to enter and prosper in competitive overseas markets, through engendering the skills and vigour needed to compete at the global level. The protective regimes and domestic monopolies which emerge therefrom cannot prepare domestic companies to compete globally. In brief, many Jamaican firms have not even been able to compete in CARICOM markets. Germany and Italy are two countries where small firms are dominant and yet they compete vigorously in domestic and overseas markets. Many of the new firms which have developed in the United Kingdom to replace the old monopolies in the "smoke stack" industries are small firms.

44. In accepting the related principles, Jamaican competition policies were developed to encompass the multiple objectives of ensuring economic efficiency, providing for the protection of consumer interest and to constrain undue concentration of economic power. It is recognized that tension and conflicts will emerge. The obvious way to resolve such conflicts in the law is by giving priority to the interest of the consumer. Behaviour or practices which increase cost to domestic consumers by protecting firms from competition should be subordinated to the criteria of competition legislation.

VIII. EXTRATERRITORIAL COVERAGE

45. The competition policies and laws of a country are generally designed to protect competition within the domestic economy and extend no protection to consumers and producers in other States. Questions concerning jurisdiction over foreign persons and entities and the proper treatment of export-oriented activities by domestic persons and entities are among the most difficult issues facing competition authorities.

46. It is not unusual for Governments actively to encourage restraint of trade where such restraint is seen to benefit the national interest. Export cartels may encourage firms to fix the prices of goods in overseas markets; buying pools may be expected to countervail bargaining power of overseas exporters. Governments sometimes constrain domestic firms from competing with one another in export markets. Domestic legislation sometimes provides for a country's enterprises to refrain from cooperating with foreign competition authorities. Chapter 6 of the recently enacted Polish Act blocks Polish domestic firms from providing information to overseas competition authorities.

47. The principles of sovereign immunity, sovereign compulsion or acts of State are invoked in defence if a firm's conduct is challenged by the laws of another State. In the United Kingdom, the 1976 Restrictive Trade Practices Act provides for exemption to anti-competitive agreements when such transactions relate to exports. The United States Webb-Pomerene Export Trade Act of 1918 exempts from the Sherman Act agreements relating to export trade. Some States have introduced immunities acts which list specific activities covered by the principle of immunity. In other instances, international trade and bilateral agreements are exempted from competition law.

48. In general, competing foreign firms shipping goods into a country should not be permitted to form cartels or fix prices. This asserts jurisdiction over foreign persons and entities for the purpose of enforcement to the maximum extent that international law might be construed to permit when such foreigner is found to transact business in the domestic market or through an agent, a subsidiary or other representative.

49. The United States has tried to enforce its anti-trust laws extra-territorially and has come up against strong resistance from the United Kingdom, Canada, Australia, South Africa and European Governments. For many years, the United States has tried to take action against the London-based diamond cartel to no avail. Conflicts arise in these instances because of the economic transfers which result from the pursuit of different industrial policies to promote growth and efficiencies of one nation at the expense of another. If all States were to respect one another's competition laws with respect to significant adverse effects, and if all nations were to aid rather than hinder enforcement, major gains would be made in international competitiveness and efficiency. In the absence of such international goodwill, the second-best solution is bilateral agreements regarding information-sharing and mutual respect for each country's competition laws. In general, there is considerable disagreement on the application of public international law to competition issues.

IX. COMPETITION LAW AND ANTI-DUMPING LEGISLATION

50. One of the recommendations advocated by the Ministry of Industry and Commerce at the time was that the competition law ought to embrace anti-dumping provisions in order to protect domestic competitors from foreign anti-competitive practices. It is not customary for competition authorities to be responsible for anti-dumping matters because anti-dumping is a trade policy matter and not related to competition policies. Competition policies seek to protect consumers, while anti-dumping policies seek to protect competitors. The effect of injury is on local industry rather than domestic

consumers. Enforcement of anti-dumping measures involves extra-territorial jurisdiction and may involve major diplomatic initiatives. Where anti-dumping measures are to be included in the mandate of a competition authority, there is the risk of breaching the authority's independence.

51. The basic issues involved in anti-dumping laws relate to the legitimacy or illegitimacy of various competitive advantages which foreign producers enjoy over domestic producers and the resultant harm the foreign producers inflict on the domestic industry. Actions are often motivated by the desire to exclude competition. Anti-dumping laws generally apply to sales in a domestic market at prices below those charged by the exporter in his home market and where such a practice results in material injury to domestic producers. Competition laws generally encourage price competition with interventions only when pricing is predatory with a view to eliminating competition.

52. It was felt that firms would also use the changing global political and economic scenario to allege unfair competition and, in so doing, divert a large share of the authority's limited resources. Should the Government consider it necessary for other reasons to combine the two areas under one authority, it was also felt that the anti-dumping laws should specify a minimum level of imports that could justify investigation and that the Commission should only be required to take account of market structure in reaching its decision on dumping.

X. COMPETITION LAW AND THE STATE

53. Another issue raised by the private sector organizations concerned the extent to which competition laws and policies were to apply to the State. Jamaica's situation is unique in that, in practice, it has widely adopted the rules under the Company's Law to establish public companies as against the more established practice of special statutes and the creation of statutory corporations. The doctrine of sovereign immunity is very clear when it is cited as a defence for the actions of the Government. The matter is less clear when it relates to statutory corporations or public companies, particularly when their actions relate to matters of trade. The private sector organizations argued that the actions of government companies and Government should also be subjected to the measures of the new competition law. The view which eventually prevailed in the debate was that public companies should be subject to competition law where their anti-competitive actions relate to trade and that the actions of the Government under the doctrine of sovereign immunity would be excluded from the reach of the competition measures. Government was to be encouraged, however, to continue its practice of liberalization of the economy.

XI. COMPETITION LAW AND THE PROFESSIONAL SERVICES

54. It was expected that the inclusion of professional services in the jurisdiction of the new competition law would evoke strong hostility from the very powerful legal fraternity. The response and arguments for exclusion were not only predictable, they followed much the same lines as those adopted in other countries where competition measures were being extended to the professional services.

55. Historically, professions have been free to regulate the means by which practitioners compete with each other. They have been exempted from standard rules of competition and from restrictive business practices legislation, reflecting a belief that competition in professions would not provide socially optimum outcomes or maximize consumer welfare. It was felt that professions were best qualified to regulate themselves and to establish ethical practices. Through the power of self-regulation granted by Governments, professions restrict entry to their markets, seriously constrain advertising, fix fees and charges and prohibit business structures which would enhance efficiency and consumer welfare.

56. The professions have justified these anti-competitive practices on the grounds that they are necessary to promote and preserve the quality and integrity of their services. In recent years, however, the escalating costs of professional services, as well as changes in technology which no longer make certain established conditions relevant today, have prompted a re-examination of the relation of professionals to competition policies. 16/

57. The response of the Jamaica Bar Association was that the canons of the legal profession allow attorneys to have regard to the Bar Association's scale of fees in assessing reasonableness of fee, also that the canons of the profession prohibited advertising and touting of services. 17/ These acts of history were to remain forever and the profession excluded from the new law.

58. Interestingly, the response of a leading law firm in Jamaica was that the restriction limiting legal partnerships to 20 members was an historical relic, long since abandoned in the United Kingdom. There was also support for allowing professionals to practise in the form of limited liability companies. What was clear was that the regulation of professional services was still entrapped in English eighteenth century rules and regulations which had either been abolished in the United Kingdom and several other countries or were actively being considered for abolition. The Government did not accept the arguments of the professional groups and regulation was extended to those involved with the delivery of services. In particular, the professions are restrained from placing restrictions on advertising, establishing professional fee schedules and restricting the forms of professional business structure.

59. Restrictive business practices in the professions have contributed to market imperfection in the provision of services by restricting the flow of information to consumers, preventing price competition in the form of fee schedules, impeding efforts towards more efficient forms of business structure and entry into the professional markets. In countries where most such restrictions have been removed there has been no identifiable lowering of standards or injury to the consumer; in fact, competition has led to innovation and lowering of prices in several instances such as in the market for optical services and equipment in the United States.

XII. INTERLOCKING DIRECTORATE

60. The most vigorously opposed section of the draft policy statement was the section which dealt with interlocking directorate. The Private Sector Organization of Jamaica (PSOJ) considered restrictions against interlocking directorate as being not only misguided but unconstitutional, violating the

rights of freedom of association. It was argued that if the policy were implemented, it would serve to inhibit shareholders from being free to elect directors with experience and would create impediments to corporate expansion, with consequent ill-effects on investment. Both Myers, Fletcher and Gordon 18/ and the World Bank 19/ concluded that in an economy the size of Jamaica a general ban on interlocking directorate was inappropriate because of scarcity of managerial talent. Interlocking directorate provides an opportunity for information to flow between tied organizations with anti-competitive effects. The policy is not intended to restrict interlocking which is not horizontal, especially in a small country. A bank director sitting on the board of a hotel can be in a position to convey information about a competing hotel divulged to that bank for action to the detriment of the competing hotelier.

61. The unconstitutional claim by the PSOJ is a mis-statement of the law in Jamaica. Section 13 of the Constitution of Jamaica provides for freedom of association, but expressly states that such freedom is subject to respect for the rights and freedoms of others in the public interest. Section 3 further states that a law which is reasonably required for the purpose of protecting the rights and freedoms of others is not unconstitutional. 20/

62. There were strong views that the mere existence of interlocks should not of itself be prohibited unless it can be shown that the behaviour of any person has caused or represents a material threat of causing anti-competitive effects. It should not be the conduct which should be outlawed but the effect of the conduct.

63. The Banking Act adopted this approach. The incorporation of similar provisions into both the Banking Act and the Competition Act was intended to have a complementary effect. Restrictions on interlocking directorate were removed from the draft bill presented to the Parliament.

XIII. EXEMPTION OF TRADE UNIONS

64. Both the PSOJ and the Jamaica Bar Association argued that blanket exemption of the trade unions revealed failure to recognize the economic power wielded at the workplace by the trade unions in Jamaica. It was felt that the granting of total exemption could be circumvented by combinations of persons acting as trade unions.

65. The 1991 World Bank Report on Anti-trust Legislation found that, of the countries surveyed in their report, only Australia did not exempt trade unions from competition scrutiny. In most countries, organized labour for the purpose of collective bargaining enjoys broad immunity. Collective bargaining is a form of cartelization in labour markets and does have significant effects on competition in certain industries; however, the basic purpose of a trade union is that of collective bargaining over wages and conditions of work. Should trade unions be subject to the competition legislation, it would strike down the very purpose of unionization. It was not the intention of competition policies to eliminate trade unions. The general conclusion therefore was that union members and trade unions should be exempted when carrying out practices relating to remuneration and conditions of work.

66. In the United Kingdom, trade unions and analogous bodies may be subjected to the test of reasonableness under the recent doctrine of restraint of trade; hence, sporting associations such as the Test and County Cricket Boards and the Football Association have been challenged under the restraint of trade doctrine. 21/

XIV. EXEMPTION CLAUSE

67. The criticism against the policy advanced concerning exemptions was that it provided examples of activities which might be approved rather than establishing applicable criteria for exemption. The continuation in force of exemption should be conditional on continued compliance with the criteria established.

68. Almost all jurisdictions provide for exemptions to accommodate economic and political considerations. Exemption, in general, weakens competition legislation. The level of exemption provided by a given jurisdiction will depend on the historical view towards competition. In some European countries, competition has been viewed less favourably as a tool to foster economic efficiency and growth, hence legislation systems are established for sanctioning restrictive activities while at the same time allowing for the pursuit of trade and industrial policies. Cooperative agreements, for example, are exempted in the United Kingdom and France, while in the United States and Germany cooperative agreements among competing suppliers are often subjected to per se prohibitions.

69. Cartelization which allows suppliers to realize economies of scale or support sector-specific public benefits such as product quality standards are areas which are often exempted. Research and development agreements, standardization or agreement on product quality and export cartels are other specific areas.

70. Exemptions are either provided in the form of block exemptions or on an individual basis. Block exemptions provide desirable certainty for firms and eliminate the need for notification to the authorities. Individual exemptions apply where the firm has to notify the authority of the specific agreement. Where individual exemptions are allowed, it is necessary to state the applicable criteria for exemption. In the end, the Jamaica Competition Act provided for a system of notification and exemptions.

71. In addition to the exemptions granted to trade unions, also exempted from the Act are persons or businesses with rights under or existing by virtue of any copyright, patent or trademark and any arrangements that the Fair Trade Commission has authorized.

XV. MERGER CONTROL

72. Serious concern was also raised against control of mergers and acquisitions, on the grounds that in a country such as Jamaica, the size of the economy makes a certain degree of concentration of the domestic market inevitable and that efficient market size in a fully competitive market approximates a significant part of the total economy. To simply eliminate monopoly markets in a small economy such as Jamaica's could thus make some markets less, not more, efficient. 22/

73. Secondly, it was argued that in a small economy such as Jamaica's, where international trade plays such an important role, restrictions on size would hamper Jamaican firms from competing in international markets. Most importantly, it was contended that the draft competition policies were based on the presumption that the basic unit of production will remain that of the firm. The consequences of growing interdependence in the world economy is that the complicated joint venture structure which has emerged in many industries has created what Robert Reiche calls the "Enterprise Web". 23/

74. Although the historical focus of competition policies has been on the regulation of conduct, structural regulation has in recent years been gaining more attention. In fact, several OECD countries over the past 15 years have strengthened their merger control laws. Structural competition policies are concerned with the control of long-run contractual relationships such as mergers, takeovers, asset transfers and joint ventures. The rationale for subjecting mergers to some level of competition scrutiny is that they may reduce competition and adversely affect consumer welfare and the public interest and, in such a case, regulation of market structure should be seen as complementary to conduct regulation.

75. There is no doubt that global economic conditions have become more competitive, supporting the position that merger plans should not be evaluated against the competitive structure of their domestic market but rather against the wider international markets. However, the monopolistic structure of Jamaican firms which has developed over three decades has not helped them neither to enter export markets nor to meet competition from international suppliers. Furthermore, over 70 per cent of the Jamaican economy is in the service sector, for example, distribution, insurance and real estate; these sectors have not been exposed to any significant international competition. Changes in technology have eliminated the natural monopoly characteristics of many industries, allowing for competition to benefit consumers, as in the case of the telecommunication industry.

76. There is little empirical evidence to support that mergers, for example in the United Kingdom during the 1960s and 1970s were motivated either by economies of scale or resulted in substantial economies of scale. 24/ Considerable evidence has also been emerging that much of the mergers in the United States over the past 15 years were misguided, providing none of the benefits anticipated when they were contemplated.

77. Mergers raise important public issues. Their importance depends on the type of merger, which is either of a horizontal, vertical or conglomerate nature. Horizontal mergers are those which take place between competitors in the same product field or at the same level of the distribution chain, and are considered the greatest threat to competition. Vertical mergers occur between firms at different market levels; conglomerate mergers take place between firms in unrelated markets and may be the result of product line extensions, geographical market extensions or simply a pure conglomerate merger with no functional linkage between the merged firms. Vertical mergers can harm competition, but less so than horizontal mergers, and hence present a weaker case for regulation. The rationale for the control of conglomerate mergers is that they lead to concentration of economic power and eventually the

accumulation of more political power than desirable in a democracy. Many mergers in recent years in the United States have been motivated by short-term benefits leading to asset-stripping rather than economies-of-scale.

78. Intervention to prevent a merger is seen as interference in the free market in which shares are sold as well as in the market corporate control. Several mergers do in fact benefit economic efficiency. It may be cheaper to take over a distributor than to establish a new distribution system. Hence a merger may provide access to cash and patent rights, allow firms to reach the critical mass needed to fund research and development, or provide access to management skills. The threat of a take-over acts as a major disciplining effect on managers of a firm. Under the principal agent theory, the effectiveness of the take-over mechanism in establishing incentives for good financial performance of a firm is very important. 25/ An interventionist approach could distort the market for corporate control.

79. The basic conclusion is that while vast numbers of mergers benefit competition, in many instances mergers are harmful. United States anti-trust regulators have taken a much stricter position on mergers than countries in Europe where the policy towards mergers is often essentially benign and implies the presumption that mergers are generally in the public interest. The recommendation for the Jamaican situation was to have been that of a benign policy; however, the powerful lobby evoked by the private sector ensured that the merger control clauses were removed from the final act and the emphasis placed on abuse of a dominant market position. The Jamaican Competition Act, therefore, does not provide any measures to deal with mergers and acquisition.

XVI. MARKET DOMINANCE AND MARKET POWER

80. The position adopted by the authorities is that the mere act of market power or market dominance does not of itself violate competition and that it is dominant behaviour and conduct that would be subjected to sanction. Dominant position is defined as being that position which an enterprise holds in the market such that it will be able to operate in that market without effective constraints from competitors. Where dominant position is sanctioned by license, as in the case of utilities or the proposed urban transport monopolies in Kingston, Jamaica, it remains to be seen how the authority will deal with abuse of such dominance. The Fair Trade Commission has since claimed that it has the powers to intervene where there is an abuse of dominant position regarding regulated utilities. Investigations are currently taking place with the privatized telecommunication utility.

81. Market power and market dominance are terms often used interchangeably. Market power is often defined as the ability to vary price without suffering variations in sales, owing to the absence of substitutes. In examining market power, consideration must be given to the product market and the geographical market. Merger authorities regulating monopoly power through market power often provide guidelines with respect to what constitutes a product market and what constitutes the locale. Countries differ in their construction of anti-competitive markets. In the United States the definition includes competition from potential suppliers if that competition is sufficiently

immediate, occurring within one year of a hypothetical price increase. In Europe only current suppliers are considered. The United States policy takes into effect potential entry and, to some extent, the contestability of the market.

82. The locale can vary from small areas, in the case of a retail shop, to the global market. Trade protectionist policies such as tariffs and quotas may further serve to curtail the size of the market. The ability to exercise market power is influenced by the number of competing suppliers or product alternatives available. The United States adopts a concentration index, the Hirschman-Hertindahl Index (HHI), defined as the squared market shares expressed in percentage terms for all suppliers in the market. 26/ The index increases as the market becomes more concentrated. Where firms experience high fixed costs, the tendency towards collusion will be higher.

83. European competition laws, unlike those in the United States, are based, as in the case of Jamaica, on the concept of market dominance, freedom from the constraints of competition. Market dominance is concerned with the unilateral exercise of market power. Similarly, as in the European case, it is not the existence of dominance which is prohibited but the abuse of the position. The issue of dominance is an economic one and it is not simply a firm's market share which is relevant. If there are no restrictions to entry, a large market share can be whittled away. Barriers to entry and factors which deal with product differentiation must be taken into account. The determination of dominant market and market dominance requires more than legal competence and requires sophisticated understanding of how markets work.

84. Competition laws based on market power tend to emphasize economic efficiency and the economic welfare of consumers. On the other hand, the dominance concept, while encompassing the exercise of market power, tends to emphasize the welfare of upstream or downstream trading partners rather than final consumers 27/ Identifying the existence of a dominant position is just the first step, as the more complicated issue is to decide what constitutes dominant behaviour. Behaviour which may be considered perfectly legitimate where a competitive market exists may be condemned when carried out by a dominant firm. Practices which constitute dominant behaviour under various forms of legislation can involve unfair or predatory prices, limitations on production, price discrimination, refusal to supply, exclusionary deals and unfair trading conditions. The concept market dominance will not be sufficient to allow the Jamaican authorities effectively to deal with monopoly power.

XVII. CONSUMER UNFAIRNESS PRACTICES

85. In general there were no major objections to the policy measures outlined in the Green Paper to deal with consumer protection except for the section which called for the posting of prices. It was felt that the posting of prices for small market traders and services providers would be impractical and uneconomical.

86. The question was raised, however, as to whether consumer protection legislation should form part of legislation dealing with competition policies and whether the same authority should adjudicate on both matters. Much of that which was proposed in the Green Paper could be classified as matters

involving transactions in goods, such as fair labelling, product standards and warranties of sale, and it was felt that, as part of a revision, this could readily be incorporated, into the Sale of Goods Act and the Hire Purchase Act, possibly in addition to, or instead of, their inclusion in the Competition Act. 28/

87. The consumer issues comprised three separate matters - the need for consumer protection related to the disclosure of information, the need for legislation dealing with the sale of goods, and the need for consumer public education on the role of prices and competition in a market economy. The Fair Competition Act eventually provided for regulation over misleading advertising and information relating to warranties and the sale of goods. Tied selling, double ticketing, sale above advertised prices and bait selling have all come under the scrutiny of the Commission.

88. There are advantages in having one government authority enforcing both competition and consumer protection law. Consumer protection issues, however, can evoke strong political interests. Therefore it is important that the competition authority not allow itself to be overwhelmed by consumer affairs matters or be seen as another consumer lobby group and be distracted from more important issues dealing with market efficiency and the enhancement of the competitive process.

89. Consumer unfairness practices have been widely practised over the years in Jamaica, in the form of hoarding, deceptive information, tie-in sales and infringement of warranties. More often than not the principle of "Buyer Beware" has been standard market practice. Jamaica has not been able to support a strong consumer lobby and although a Consumers' League and a Taxes and Rate Payers Association exist, their impact has at best been sporadic. The absence of a strong consumer lobby group is said to impose more responsibility on the Competition Commission to be pro-active in consumer affairs matters.

XVIII. RESTRICTIVE BUSINESS PRACTICES

90. The private sector organizations accepted the need to introduce policies which would restrain anti-competitive market behaviour. Concern, however, was expressed at two levels. First, it was felt that phrases such as "market dominance", "relevant markets", "anti-competitive effect", and "substantial business justification", outlined in many areas of the Green Paper, were too vague. Interpreting and applying these concepts would require in-depth economic research and analysis. Secondly, it was argued that little data or expertise existed in Jamaica to deal with such complex economic issues and the acquisition of such expertise would be a gradual process.

91. American anti-trust laws approach potentially anti-competitive acts using a "per se", "rule of reason", or "prima facie" decision rule, depending on the category of restraint. These terms have become widely used in the general vocabulary concerning competition legislation. In interpreting the 1980 Sherman Act, the United States courts concluded that there were types of contracts which, on the face of it, were plainly in restraint of trade and injurious to the consumer. The judicial task, therefore, was simply to show that the restraint existed.

92. Other contracts or behaviour could not be treated as precisely and required weighing the probable benefits of the act against any potential harm. In such instances, the United States courts applied the rule-of-reason approach. This approach is cumbersome and time-consuming. It requires reliable information on industry conditions and involves case-by-case analysis of each situation. With the rule of reason approach, the burden of proof falls on the plaintiff. The prima facie approach shifts the burden of proof from the plaintiff onto the defendant and so therefore favours the plaintiff. The distinctions between the three approaches are not rigid. United States courts, however, have come to regard horizontal price-fixing, bid-rigging and collusive tendering, market allocation, concerted refusal of suppliers to sell or consumer boycotts as per se categories because these actions are seen as directly limiting competition.

93. The recommendation made in the Jamaican competition policy paper was to prohibit horizontal restraints on the basis of the per se principle. One advantage of this step is that it creates certainty for commerce and is less costly to enforce.

94. Horizontal restraints between competing suppliers are considered to be the most damaging practices affecting competition. Price-fixing between competing suppliers is considered the most anti-competitive behaviour as it allows firms to create the conditions of a monopoly. Parallel price-fixing occurs where suppliers refrain from using price as a means of competition, as in the case of oligopolistic industries where price-fixing is an indicator that the market is engaged in anti-competitive practices. It is generally difficult to adjudicate such questions and hence the rule of reason approach is often relied on.

95. Horizontal restraints between competing suppliers are often exempted from competition laws where such agreements can enhance economic efficiency and produce other beneficial effects. Research and development agreements, joint production and standardization agreements are examples of exempted agreements.

96. Vertical restraint agreements between firms operating at different levels of the market may, on the one hand, damage competition or allow firms to exercise market power, while, on the other hand, there are circumstances where such restraints may enhance economic efficiency. Vertical restraints give rise to complex theoretical and analytical economic problems; for this reason the rule of reason approach was advanced for the Jamaican legislation. Examples of vertical restrains are exclusive dealings, selective premium offers, price discrimination, typing agreements, refusal to sell and territorial restraints.

97. The Resale Price Maintenance (RPM), a vertical restraint, poses a special problem. There is still widespread disagreement between economists as to the rationale for prohibiting RPM. A common view is that it is a retailers' cartel and, as such, a form of monopoly. Economists have argued that the relationship of a retailer with a manufacturer is that of an agency relationship and that restrictions on how the agent-retailer should operate do not differ from policies that the manufacturer would use if he owned the outlets. Surveys have also found that prohibition of RPM was often followed by significant retailing innovation, e.g., in the United Kingdom, Canada, Sweden and Denmark.

98. Resale price maintenance acts against the interest of low cost retailers and may lead to prices being higher than they would otherwise be. RPM keeps the inefficient retailer in the market. Retailers should not be deprived of the opportunity to compete. RPM also deprives the consumer of choice. Vertical price-fixing can also trigger undesirable horizontal effects in industries which are oligopolistic in nature.

99. Among the arguments in favour of RPM are that it ensures price stability and orderly marketing; producers will impose restrictions on distributors of their own products only in order to intensify intra-brand competition; it provides small firms with protection against the overwhelming power of the chain stores.

100. Section 9 (1) (a) of the 1976 United Kingdom Resale Prices Act renders RPM agreements void and it is unlawful to include such agreements in a contract. Conversely, United States laws treat resale price agreements under the rule of reason approach. The policy recommendation in the Green Paper argued for RPM to be prohibited.

101. This policy was the one accepted and the Fair Competition Act therefore prohibits resale price maintenance. Because of the higher levels of concentration in many consumer goods markets in Jamaica, intra-brand competition is likely to be weak and RPM could serve to facilitate horizontal price collusion. Except in the case of RPM, the general recommendation was that vertical agreements to restrain trade should receive more lenient treatment than horizontal restraints.

102. Restrictive business practices have over the years been sanctioned by several pieces of legislation in Jamaica. It is, therefore, important to consider the new competition legislation in relation to such existing legislation (see the Annex, list of relevant legislation). 29/ Government has over the years enacted a whole range of legislation which provides for creation of exclusive monopolies, the fixing and regulation of prices, the creation of capacity licences, the provision of industrial incentives, the self-regulation of professions, the regulation of the financial sector and the protection of consumer welfare. New legislation such as the Securities Act, the Banking and Financial Services Act, the Regulation of Utilities Act and the Revised Companies Act should also be examined in this regard, not only as part of the process of developing new competition policy but in the wider context of creating a more liberalized economy. The current Rent Restriction Act, Trades Act, various Commodity Boards Acts and Transport Authority Act clearly provide for the fixing of prices. These acts were introduced when Government sought to control commercial activities; in general, they are now inconsistent with market liberalization and the creation of a competitive market.

XIX. LESSONS FROM THE JAMAICAN EXPERIENCE

103. Why did the Jamaican Government introduce competition legislation? Although a dozen or so developing countries have introduced competition laws in recent years, it could not be said that there was any pressure on developing countries from multilateral and bilateral agencies to introduce competition policies. After years of fixing prices, creating monopolies, encouraging restrictive business practices and limiting entry to industries,

what factors led to such a turn-around? Competition legislation had not been featured in the People's National Party election manifesto. While the various IMF and World Bank agreements mentioned the need to introduce legislation to deal with the regulation of monopolies, securities and aspects of the financial sector, there had been no mention before 1989 of the need for a Competition Act.

104. The introduction of competition following price decontrol is unquestionably an economically desirable strategy. While trade liberalization ensures competitive markets, not all markets are international or likely to benefit from trade liberalization. Markets such as distribution, real estate and health services are rarely exposed to intensive competition from foreign firms.

105. Were there political advantages to be gained or were ideological factors operating to influence the decisions taken? When the Minister for Commerce at the time was asked about this, he stated that Government was removing so many controls in the market that something was needed to show the consumer that Government was still seeking a way to protect consumer interest. The Deputy Prime Minister who piloted the initial development of the Competition Act through saw it as an important instrument in levelling the playing field and opening up opportunities for other players. The experiences of most cabinet members at the time regarding competition legislation did not go beyond newspaper reports of the United States Justice Department case against AT&T and the subsequent break-up of that company.

106. Competition legislation has been seen by the political directorate as a consumer protection measure and a mechanism to help the small entrepreneur rather than being part of a general set of measures designed to advance economic efficiency. What lessons can be drawn from the Jamaican experience? Competition legislation must be seen as part of general liberalization measures; they must be complementary to trade liberalization, privatization and price decontrol. The introduction of such legislation requires careful planning and research. It must take into account the structure of existing legislation on monopolization and price control.

107. Any legislation which seeks to attack entrenched privileges and behaviour will run into major resistance from interest groups that stand to lose from changes. Major opposition came from the commercial sector and the professional groups. Substantial resources, of both time and money, were made available in the process of lobbying efforts to defeat enactment of the draft bill. While these efforts did not achieve their ultimate objective, they helped to create a much more lenient Act compared with the original policy proposal. Key areas such as merger control and the control of interlocking directorate were removed from the final bill. Other developing countries hoping to introduce competition legislation can expect to meet similar opposition from their commercial and professional sectors.

Notes

1/ George Bittlingmayer, "The Stock Market and Early Antitrust Enforcement", Journal of Law and Economics, vol. 26 (1) (PT.), April 1993, p. 3.

2/ Roger A. Boner and Reginald B. Krueger, "The Basics of Antitrust Policy - A Review of Ten Nations and European Communities", World Bank Technical Paper, No. 160, 1993, p. XI.

3/ See H. Leibenstien "Allocative Efficiency vs. X-Efficiency", American Economic Review, 56 (3), 1966, pp. 392-415, and J.C. Cross, "Incentive Pricing & Utility Regulation", Quarterly Journal of Economics, 1970, pp. 236-253.

4/ J. Clarke, "Toward a Concept of Workable Competition". American Economic Review, vol. 30, pp. 241-256, 1940.

5/ W.J. Baumol, J.C. Panzar and R.D. Willig, Contestable Markets and the Theory of Industry Structure, New York, Harcourt Brace Jovanovich, 1982.

6/ Inter-American Development Bank Report on "Legal and Regulatory Framework for Business in Jamaica", p. 3, 1991.

7/ Planning Institute of Jamaica, "Comparative Advantage and Incentive Study", Final Report, February 1986.

8/ Report provided by the Prices Commission and by the Technical Sub-Committee on the Commerce Sector, established in 1990 to examine restrictive business practices in trade.

9/ Statement to the House of Representatives by the Deputy Prime Minister, "Government Plans on Monopolies and Competition Policy", October 1990.

10/ Pablo T. Spiller and Cezley I. Sampson, "Regulation Institution and Commitment: The Jamaican Telecommunication Sector", World Bank, March 1993, p. 54.

11/ Richard Whish. "Competition Law", second edition, Butterworth, London, 1989, p. 49.

12/ The United States technical team was composed of the economists Robert Crandoll and Bruce Owen and attorney Robert Skitol. See "Final Report of the Advisory Team, Competition Policy in Jamaica" USAID, 1991.

13/ Government of Jamaica, "Proposal for a Competition Act", 1991.

14/ "Comments of the Private Sector Organization of Jamaica on the Green Paper the Proposal for a Competition Act", 30 August 1991.

15/ UNCTAD, "The Role of Competition Policies in Economic Reforms in Developing and Other Countries" (TD/B/RBP/96), Geneva, September 1993.

16/ OECD, "Competition Policy and the Professions", 1985, p. 8.

17/ The Bar Association in Jamaica, "Report of the Commercial and Industrial Law Standing Committee on the Proposal of the Competition Act", June 1991, p. 8.

18/ Myers, Fletcher and Gordon, "Proposed Notes on Competition Act", July 1993, p.3.

19/ Pablo T. Spiller, "Comments and Recommendations on the Proposal for a Jamaican Competition Act", World Bank, June 1993, p. 5.

20/ Derrick McKoy, Peter Carson, Bryan Noble, S. McGhie and M. Fogg, "The Proposed Competition Act. An Analysis of the Green Paper", Revision 1.I, October 1991, p. 12.

21/ Richard Whish, "Competition Law", op. cit.

22/ Inter-American Development Bank, Comments on the "Legal and Regulatory Framework for Business in Jamaica", June 1991, p. 3.

23/ Notes on the Competition Act, from Sir Alister McIntyre, UWI, July 1991.

24/ Brian Chillin and Mike Wright, "The Logic of Mergers", Hobert Papers 107, London, 1987, p. 24.

25/ John Vickers and George Yarrow, "Privatization and Economic Analysis", London and Cambridge, 1988, p. 16.

26/ Boner and Krueger, op. cit. p. 13.

27/ Ibid., p. 17.

28/ Inter-American Development Bank, op. cit. p. 7.

29/ See McKoy, et al. op. cit., p. 38.

ANNEX

RELEVANT LEGISLATION

Acts relating to public utilities, Government monopolies and State enterprises

Airport Authority Act, s 3,8.

Broadcasting and Radio Re-diffusion Act, ss 2, 3, 4, 8.

Cargo Preference Act, s 53.

Electric Lighting Act.

Electricity Development Act.

Hospitals (Public) Act.

Kingston and St. Andrew Water Supply Act.

Jamaica Broadcasting Act, ss 3, 6, 7.

Jamaica Railway Corporation Act ss 3, 7, 11, 18.

National Water Commission Act, s 11.

Parishes Water Supply Act, s 16.

Post Office Act, s 7.

Public Passenger Transportation (Corporate Area) Act, ss 3, 8.

Public Passenger Transportation (Rural Area) Act, ss 3, 8.

Radio and Telegraph Control Act, ss 5, 8.

Telegraph Act, s 5.

Telephone Act, ss 3, 4, 5.

Ports Authority Act.

Acts relating to price controls and regulation of industries

Agricultural Marketing Act, ss 3, 4.

Banana Board Act, ss 3, 11, 12

Cocoa Industry Board Act, ss 3 (i), 5, 8.

Coconut Industry Control Act, ss 3, 14, 15, 20.

Companies Act.

Coffee Industry Control Act, s 7, (1), (a), (j), (m), (n).

Jamaica Co-operation Marketing Association Protection Act, ss 2, 4.

The Local Industries (safeguarding) Act, s 7.

Mining Act, s 3, 7.

Partnership (Limited) Act.

Petroleum Act, ss 5, 6.

Rent Restriction Act, ss 9, 13, 19.

Rice Industry Board Act.

Pilotage Act, s 3.

Sugar Cane Farmers Act, s 2, 3, 4.

Sugar Industry Act.

Tourist Board Act.

Trade Act, ss 1, 8.

Tobacco Act, s 5.

Transport Authority Act, s 16.

Acts relating to tax concessions, encouragement of industry

Bauxite and Alimina Industries (encouragement) Act, ss 2, 4, 5, 8, 9.

Bauxite and Alimina Industries (Special Productions) Act, ss 4, 5.

Cement Industry (encouragement and control) Act, ss 3, 4, 5, 6, 8, 9, 11.

Export Industry Encouragement Act, ss 3, 4, 9, 11, 15.

Hotels (Incentive) Act.

Industrial Incentives Act, ss 3, 4, 9-13, 15, 16.

Industrial Incentives (factory construction) Act, ss 3, 4, 8, 12.

International Finance (companies income tax relief) Act, ss 2, 3, 5.

Motion Picture Industry (encouragement) Act, ss 6, 7.

Petroleum Refining Industry (encouragement) Act, ss 6, 7.

Resort Cottages (incentives) Act, ss 7, 8.

Shipping (incentives) Act, ss 6, 8.

Acts relating to professions

Architects Registration Act, ss 3, 4, 9, 14, 15, 23.

Council of Legal Education Act.

Dental Act, ss 3, 4, 9, 11, 17.

Legal Profession Act, s 21.

Medical Act, s 15.

Pharmacy Act, ss 3, 4.

Pilotage Act, s 3.

Public Accounting Act.

Real Estate (dealers & developers) Act, s 5.

Trade Union Act.

Acts relating to CARICOM

Caribbean Community and Common Market Act, ss 3, 4, 6.

Caribbean Food Corporation Act.

Caribbean Investment Corporation Act.

Acts relating to tariffs, imports licences

Consumption Duty Act, ss 3, 4, 6, Schedule.

Customs Act, ss 5, 3, 9, 40, 41.

Customs Duties (dumping and subsidiaries) Act, s 3, 4, 8-10.

Foreign Sales Corporation Act.

Jamaica Export Free Zones Act, s 3, 6, 20, 23, 28, 38, 39.

Acts relating to minimum wage

Apprenticeship Act.

Minimum Wage Act.

Acts relating to consumer welfare

Fertilizer and Feedings Act.

Food and Drugs Act.

Food Shortage and Prevention of Infestation Act, ss 3-9.

Hire Purchase Act.

Public Health Act.

Weights and Measures Act, ss 3, 4, 5.

Sale of Goods Act.

Miscellaneous

Banking Act, ss 3, 4.

Bank of Jamaica Act.

Building Societies Act, ss 3, 9.

Exchange Control Act, ss 2, 3, 7, 8.

Industrial and Providential Societies Act.

Land Acquisition Act.

Money Lending Act.

Jamaica Stock Exchange Act.

Stamp Duty Act.

Transfer Tax Act.